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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.R. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Y.C., Defendant and Appellant.	E054518 (Super.Ct.Nos. J232964 & J232966) OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION[1]

Mother appeals from the orders of the juvenile dependency court 1) denying her reunification services with two minor children, 2) denying her section 388 petition, and 3) entering a judgment terminating her parental rights.

Mother argues the juvenile court erred in its application of the bypass provisions of section 361.5, subdivisions (b)(6) and (7). Additionally, mother maintains the court abused its discretion in denying her section 388 petition, seeking an order for reunification services.

We affirm the orders and judgments of the juvenile court.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

Children and Family Services (CFS) filed the original juvenile dependency petition in May 2010, alleging failure to support and abuse of a sibling. (§ 300, subds. (g) and (j).) Mother and father had two children: Ruby, born in June 2009, and D., born in April 2010. Mother had an older third child, Rachel, born in May 2006.[2]

On May 19, 2010, Ruby was transported to the hospital in full cardiac arrest. The child presented retinal hemorrhaging and was dying. The doctor observed an anal tear.

[1] All statutory references are to the Welfare and Institutions Code.

[2] The children's' two fathers are not parties to this appeal.

The child was bleeding from the anus and oozing fecal matter. The doctor diagnosed a case of potential child abuse. The doctor said child abuse and sexual abuse were indicated by the retinal hemorrhage and the possible abdominal trauma. The forensic pediatrician later asserted the anal tear was "fresh" and "acute" and would not have occurred from CPR or by the child's death throes.

The parents insisted Ruby had been normal from 11:00 p.m. the night before until father got up about 4:00 or 5:00 a.m. and noticed Ruby was not responsive. The parents could not offer any explanation for her condition. The police questioned father, who confessed to shaking or dropping Ruby, after which he was arrested.

The other children, D. and Rachel, were taken into protective custody. The court ordered the children detained pursuant to section 300.

B. Jurisdiction and Disposition

In July 2010, while incarcerated, father made statements to CFS that Ruby had fallen out of his arms. He tried to perform CPR but then put her back in her crib. The social worker and father engaged in a long colloquy about why his various explanations about what had happened were implausible and inconsistent. Father denied that mother had visited him in jail but the visitor's log recorded that she had visited 28 times in May, June, and the first half of July 2010.

CFS described how mother seemed willing to cooperate but failed to maintain contact with CFS and missed scheduled visitations with the children. Mother also continued to visit father in prison, 17 additional times in the second half of July and August 2010. Mother maintained her loyalty to father and refused to acknowledge his

responsibility for their daughter's death.

A forensic pathologist determined the main cause of death was not shaking or head trauma. Suffocation was not excluded as the cause of death. No natural cause of death was plausible, making child abuse the only possible cause.

The amended section 300 petition added allegations against mother of serious physical harm and that she caused the death of a child through abuse or neglect. (§ 300, subds. (a) and (f).) The second amended section 300 petition added further allegations of serious physical harm and failure to protect. (§ 300, subds. (a) and (b).) The supporting detention report included information from the forensic medical report, summarizing Ruby's injuries as "[s]everely abnormal head CT consistent with an hypoxic/ischemic event," "[b]ilateral retinal hemorrhages," and "[r]ecent rectal tear." The report concluded, "there is no natural etiology for this child's presentation. The finding of severe hypoxic brain injury and bilateral retinal hemorrhages is consistent with inflicted head injury. The rectal tear is due to blunt force trauma." CFS repeatedly recommended no family reunification services for mother or for the two fathers.

In September 2010, CFS submitted an addendum report describing various disclosures from Rachel to another child, including that her uncle Tony and other male maternal relatives had put a "thing" in her mouth and mother knew and had threatened to hit Rachel with a belt. Rachel also expressed fear that father and Tony would "come do something to her at night." Rachel rubbed her palms together and said father would get on top of her and touch her. Rachel knew the slang Spanish word "cochar" means sexual intercourse. Mother had encouraged Rachel to "cochar" with a person named Mocho.

Indicating her genitals, Rachel said other men had touched her. Mother behaved very negatively during visitation and called Rachel names.

The coroner's report finally concluded the cause of death was "[h]ypoxic ischemic encephalopathy due to hypoxic event of undetermined etiology" and the manner of death was "undetermined." The anal tear "was a perianal fissure that did not involve the rectum." The cause of death was consistent with father dropping the child and then shaking her.

At the jurisdiction hearing, the court found true all the allegations of the dependency petition, except it dismissed the allegation that mother had caused the death of Ruby by abuse or neglect. (§ 300, subd. (f).)

At the disposition hearing on September 23, 2010, the social worker testified that both parents were dishonest and inconsistent about Ruby's death. Mother did not accept any responsibility for her failure to protect Ruby. Mother was critical and disparaging toward Rachel.

The court denied reunification services under section 361.5, subdivision (b)(6) and (7). The court characterized mother's conduct as an act of omission not commission. The court found a risk of detriment to the children if they continued in their parents' home. The court terminated mother's visitation and set a section 366.26 hearing to plan for adoption. The court found it was not in the best interests of the minors to place them with the maternal grandmother.

C. Section 388 Petition and Termination of Parental Rights

On January 4, 2011, mother filed a petition asking the court to order reunification

services. Mother asserted she had completed eight counseling sessions and realized the importance of protecting her children. She was completing a parenting program. Mother alleged she had recently obtained stable employment and a home for her children.

On January 12, 2011, CFS filed its section 366.26 report, recommending parental rights be terminated and a permanent plan of adoption be implemented. The children's maternal great-aunt and her husband were being evaluated for adoption in Texas.

CFS responded to the section 388 petition, recommending the court deny reunification services. Mother claimed the previous reports of "her participating in and support of her perpetrating husband, were misunderstood, as it was a confusing and traumatic time after the death/loss" of Ruby. CFS acknowledged that mother had kept in contact, showed concern for her children, and independently participated in counseling and parenting programs. Mother claimed she had accepted responsibility for Ruby's death and she was divorcing father. She insisted she would be able to care for her children.

In March 2011, CFS submitted a letter to the court documenting that mother had been in counseling and attending a parenting program, obtained employment, rented a two-bedroom apartment, and filed for divorce. Her counselor offered the opinion that mother was "able to set and implement realistic plans for keeping her children safe and keeping herself financially stable enough to care for them." Nevertheless, CFS expressed concern about mother's ability to protect her children from abuse. Although her efforts suggested she was on a path toward growth and recovery, "this is not indicative of substantial change, which is needed to be protective of two young vulnerable children . . .

totally reliant of the care and supervision of others for their safety and well being." In the opinion of CFS, mother had not "demonstrated a change in circumstances nor established the capacity to adequately protect her children based solely on her reports of such short term efforts and/or progress." CFS recommended the court deny mother's request for reunification services.

Mother submitted supplemental materials in which she stated she was working as a warehouse inventory employee and had rented a two-bedroom apartment. She was working to obtain a general equivalency diploma. She had completed 40 hours of positive practical parenting. She admitted father had murdered Ruby and she asked to receive reunification services. Her divorce was filed on March 15, 2011. Mother recounted seeing her children at a mall with the foster mother on December 31, 2010. Rachel ran to her, hugged her, and asked her to come home.

In May 2011, CFS reported the maternal great-aunt and her husband had been approved for prospective adoptive placement. CFS determined that mother could not be relied on to protect her daughters from physical and sexual abuse. CFS recommended terminating parental rights. The children were placed in Texas.

At the hearing on the section 388 petition in July 2011, mother testified that she had been laid off from her warehouse job and was living with her mother. She pleaded to be given a "second chance."

The court observed that mother had made "great strides" but she had not met her burden to show a change of circumstances to warrant granting the section 388 petition. The court found clear and convincing evidence the children were adoptable and

terminated parental rights.

III

DENIAL OF REUNIFICATION SERVICES

Reunification services are offered to parents whose children are removed from their custody to facilitate reunification of parent and child and further the goal of family preservation, whenever possible. Section 361.5, subdivision (b), sets forth certain exceptions—also called reunification bypass provisions—to the general mandate of providing reunification services. (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1112 (*Allison J.*).)

Initially, the juvenile court denied mother reunification services under section 361.5, subdivision (b)(6) and (7), which allow the court to bypass the usual procedures for providing reunification services. Section 361.5, subdivision (b)(6) allows the court to deny reunification services in cases involving severe sexual abuse or the infliction of severe physical harm to a sibling or half-sibling. Mother contends the dependency court violated her procedural due process rights by using section 361.5, subdivision (b)(6) and (7) without making the required findings and not applying the clear and convincing evidence standard. Those statutes provide:

"(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶]

"(6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm

to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. [¶] . . . [¶]

"A finding of the infliction of severe physical harm, for the purposes of this subdivision, may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body or the body of a sibling or half sibling of the child by an act or omission of the parent or guardian, . . .

"(7) That the parent is not receiving reunification services for a sibling or a half sibling of the child pursuant to paragraph . . . (6)."

The Legislature recognized it may be fruitless to provide reunification services under certain circumstances. When the court determines a bypass provision applies, the general rule favoring reunification is replaced with a legislative presumption that reunification services would be an unwise use of governmental resources. (*In re Allison J, supra,* 190 Cal.App.4th at p. 1112.)

To determine whether a statute comports with due process, the court must consider: (1) "the private interests affected by the proceeding;" (2) "the risk of error created by the State's chosen procedure;" and (3) "the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599.)

"Other courts have considered—and rejected—due process challenges to section 361.5, subdivision (b)." (*In re Allison J., supra,* 190 Cal.App.4th at p. 1113, citing *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 750 & fn. 8 (*Renee J.*) [rejecting substantive

due process challenge to section 361.5, subdivision (b)(10)]; *In re Joshua M.* (1998) 66 Cal.App.4th 458, 473 [section 361.5, subdivision (b) is "'constitutional on its face'" and comports with substantive due process]; *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.

In *Renee J.* the California Supreme Court held that a mother did not possess a "constitutionally protected liberty interest in the state's providing her with reunification services." (*Renee J., supra*, 26 Cal.4th at p. 750.) The court noted that the mother's interests after the court had found jurisdiction but before the court terminated parental rights were " significant . . . [but] of a somewhat lesser order than in the decisions on which [the mother] and amicus curiae rely." (*Id.* at pp. 750-751, fn. 8.) The government's interest in "'preserving and promoting the welfare of the child, and the state's fiscal and administrative interest in reducing the cost and burden of such proceedings'" was "substantial." (*Ibid.*) Finally, the court concluded that "given the weighty interests of the state in assuring the proper care and safety of children in the dependency system, and those of the children themselves, [section 361.5 subdivision (b)(10)] sufficiently diminishes the risk of erroneous deprivations of services as to satisfy the requirements of due process." (*Id.* at pp. 750-751.)

Mother does not challenge the constitutionality of the bypass statute. Rather, she contends the court did not follow the statute's procedural safeguards. Specifically, the court did not apply the standard of clear and convincing evidence and did not make specific findings required by the statute.

As of September 2010, section 361.5, subdivisions (h) and (i) provided:

"(h) In determining whether reunification services will benefit the child pursuant to paragraph (6) or (7) of subdivision (b), the court shall consider any information it deems relevant, including the following factors:

"(1) The specific act or omission comprising the severe sexual abuse or the severe physical harm inflicted on the child or the child's sibling or half sibling.

"(2) The circumstances under which the abuse or harm was inflicted on the child or the child's sibling or half sibling.

"(3) The severity of the emotional trauma suffered by the child or the child's sibling or half sibling.

"(4) Any history of abuse of other children by the offending parent or guardian.

"(5) The likelihood that the child may be safely returned to the care of the offending parent or guardian within 12 months with no continuing supervision.

"(6) Whether or not the child desires to be reunified with the offending parent or guardian.

"(i) The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent or guardian would not benefit the child."

Respondent concedes the court may not have expressly announced it was applying the standard of clear and convincing evidence but respondent asserts substantial evidence supports the denial of reunification services. When the court denied reunification services in September 2010, it found mother had failed to take remedial action and "A

sibling of the minors has been sexually abused by—in the household and there's no reasonable means by which the minors can be protected from further sexual abuse or substantial risk of sexual abuse . . . ." Additionally, the court found:

". . . father caused the death of another child through abuse or neglect. That will be under 361.5B4. That the minors have been adjudicated dependents, pursuant to subdivision 300, as a result of the severe sexual abuse, severe physical harm to the sibling or half sibling by the parents.

"And, it . . . would not benefit the minors to pursue reunification services with the offending parents. That is under Welfare and Institutions Code 361.5B6.

"And, the court will also find that it would not be in the best interest of the minors to pursue reunification services with the offending parents under 361.5B7."

Thus, the court made findings as required by section 361.5, subdivisions (h) and (i). Substantial evidence supports these findings under the standard of clear and convincing evidence. While in her mother and father's care overnight, Ruby suffered severe fatal injuries, including retinal hemorrhaging, hypoxic ischemic encephalopathy, and an anal tear. The parents did not seek immediate medical care when Ruby was found unresponsive. Rachel was exposed to the shocking scene of her dying sister. After Ruby's death, mother continued her relationship with father, visiting him faithfully (at least 45 times) in prison and not admitting his culpability until many months after Ruby died.

One court has upheld denial of reunification services under section 361.5, subdivision (b)(6), when a child suffered the trauma of witnessing her father murdering

her mother. (*Jose O. v. Superior Court* (2008) 169 Cal.App.4th 703.) (§ 361.5, subds. (b), (h)(3).) Failure to provide medical attention also may constitute infliction of serious injury for purposes of the bypass statute. (*Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292, 294, 301-302.) (§ 361.5, subds. (b), (h)(1).) Here the additional factors of mother's complicity by omission in father's conduct, combined with her subsequent support of father and belated recognition of the substantial risk of harm to the surviving children (§ 361.5, subds. (b), (h)(5)), warranted the application of subdivision (b)(6) and (7). (*Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933, 936-942 [mother denied boyfriend's responsibility for child's death]; *Amber K. v. Superior Court* (2006) 146 Cal.App.4th 553, 561 [mother was not actual perpetrator of abuse but impliedly consented].) Mother cannot rely on *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 851-852, and *L.Z. v. Superior Court* (2010) 188 Cal.App.4th 1285, 1289, 1292-1293, in which there was no evidence a parent knew about abuse.

Substantial evidence meeting the standard of clear and convincing evidence expressly and impliedly supports the juvenile court's findings that mother was an offending parent by omission within the meaning of section 361.5, subdivisions (b)(6), (7) and (h). (*In re Kristin W.* (1990) 222 Cal.App.3d 234, 253; *Jose O. v. Superior Court, supra,* 169 Cal.App.4th at p. 708.) Any technical error by the dependency court was harmless. (*In re Nalani C.* (1988) 199 Cal.App.3d 1017, 1028, citing *People v. Watson* (1956) 46 Cal.2d 818, 837; *In re Esmeralda S.* (2008) 165 Cal.App.4th 84, 93-94, citing *In re James F.* (2008) 42 Cal.4th 901, 916, 918.)

IV

SECTION 388 PETITION

Mother next urges the juvenile court abused its discretion and exceeded the bounds of reason by not granting her section 388 petition. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Mother asserts she met her burden by demonstrating by a preponderance of the evidence that changed circumstances would make a modification in the best interest of the children. (*In re S.R.* (2009) 173 Cal.App.4th 864, 870; *In re Andrew L.* (2004) 122 Cal.App.4th 178; Cal. Rules of Court, rule 5.570(e), (f) and (h).)

The hearing on the petition was conducted in July 2011, 14 months after Rudy died. The changed circumstances identified by mother were that she had attended a 40-hour parenting class, pursued individual counseling, and was divorcing father. She had also been working and renting an apartment—although at the time of the hearing she was unemployed and living with her mother. Mother professed to a change of heart. Previously mother had denied any responsibility in Ruby's death. Without fully admitting responsibility, mother no longer defended father's conduct. During questioning, she admitted she was wrong when she did not believe Ruby had been killed but she insisted "I wasn't abusive with my children."

A father's "recent completion of a parenting course and ongoing participation in therapy did not establish a prima facie case of changed circumstances." (*In re A.S.* (2009) 180 Cal.App.4th 351, 357.) Mother's claim to new insights was not entirely persuasive. The court did not abuse its discretion in finding that mother's progress was

too slight to establish changed circumstances. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 462-463; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.)

Furthermore, mother did not make the requisite showing of the children's best interests. The factor of the seriousness of the reason for the dependency—the death of a sibling—does not support the children's best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530; *In re Ethan N.* (2004) 122 Cal.App.4th 55, 60.) The strength of the bond between mother and the children, who were one month and four years old when they were detained is questionable. (*Kimberly F.*, at p. 531.) Finally, the changed circumstances were hardly sufficient. (*Id.* at p. 532.) The interest in stability of these young children outweighed any interest they may have had in the possibility of reunification with mother. (*In re A.S., supra,* 180 Cal.App.4th at p. 358.)

V

DISPOSITION

The juvenile court did not err in its application of the bypass provisions of section 361.5, subdivision (b)(6) and (7), or abuse its discretion in denying mother's section 388 petition.

We affirm the orders and judgment of the juvenile court.

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CODRINGTON
J.

I concur:

RAMIREZ
P.J.

King, J., Dissenting.

I would reverse each of the orders and the judgment entered herein, because of the juvenile court's failure to comply with Welfare and Institutions Code section 361.5, subdivision (i).[1]

Subdivision (i) provides: "The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent . . . would not benefit the child."

Here, the trial court failed to state on the record its basis for finding severe sexual abuse or the infliction of severe physical harm. While both findings are referenced in the record, there are no articulated bases for said findings. As stated in *In re Kenneth M.* (2004) 123 Cal.App.4th 16, 21: "[S]ubdivision (i) imposes on the juvenile court the duty to state the basis for its findings." (See also*Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 847 [the court is required to "read into the record" the basis for its finding].)

Perhaps more fundamental is the total absence of "the factual findings used to determine that the provision of reunification services to the offending parent would not benefit the child[ren]." (Subd. (i).) As acknowledged by the majority, the juvenile court

[1] All further references to subdivisions are to section 361.5 of the Welfare and Institutions Code.

did utter the words: "And, it . . . would not benefit the minors to pursue reunification services with the offending parents. That is under [subdivision (b)(6)]. [¶] And, the court will also find that it would not be in the best interest of the minors to pursue reunification services with the offending parents under [subdivision (b)(7)]." This is simply inadequate. The court must place on the record its *factual findings* used to determine that reunification would be of no benefit. "If the court denies reunification services to an offending parent under subdivision (b)(6), the court . . . must . . . specify the factual findings used to determine that the provision of reunification services to the offending parent would not benefit the child." (*Tyrone W. v. Superior Court*, *supra*, 151 Cal.App.4th at p. 847.)

Subdivision (h) sets forth factors which may be considered in determining the appropriateness of reunification. (See *In re Ethan N.* (2004) 122 Cal.App.4th 55, 66-67 [enumerating additional factors to be considered by the juvenile court in determining whether reunification would serve a child's best interest].) And, subdivision (i) contemplates that the record shall contain a discussion of these factors in arriving at the decision of whether reunification is appropriate.

The present record is simply devoid of the required factual findings. Compliance with subdivision (i) is neither an idle act nor one that should be treated as pro forma. Much like a statement of decision in a civil case, "[f]indings [are] . . . fundamental to the decisionmaking process. [Citation.] '. . . [F]indings of fact [are] for the benefit of the court and the parties. To the court it gives an opportunity to place upon [the] record, in

definite . . . form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which judgment rests.'" (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126-127, italics omitted.)

Because of the absence of the required findings of fact, I would reverse.

KING
J.